80-1487

No.

Office-Supreme Court, U.S.
FILED
FEB 28 1981
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

October Term, 1980

---

**BETTY SANDER HARVEY,**

*Petitioner.*

vs.

**CHARLES D. CONNOR,**

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

---

BETTY SANDER HARVEY
834 Monroe Avenue
River Forest, Illinois 60305
*Pro Se Petitioner*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## QUESTIONS PRESENTED FOR REVIEW

1. Is dismissal of Petitioner's complaint so lacking of rational evidentiary support or substantiation in law as to render dismissal violative of due process and repugnant to justice?

   a. Was there any basis for the trial court's dismissal of Petitioner's complaint?

   b. Must this court accept the appellate court's misapplication of the five year statute of limitations to petitioner's legal malpractice complaint which contains seven counts of fraud, as well as 50 allegations of fraudulent concealment, and was filed for jury hearing?

   c. Was the Illinois Supreme Court's decision to deny Petitioner's Petition for appeal an objective decision and consistent with fairness and justice?

2. Has Petitioner been deprived of a fair and impartial hearing, in accordance with due process of law, her right to equal protection of the law and her right to jury trial?

   a. Can procedural due process be achieved when a plaintiff's cause of action is legal malpractice and when she has been obliged to act pro se because her cause of action is legal malpractice?

   b. In action at law where the value in controversy exceeds $20.00 is the right to trial by jury guaranteed by the 7th Amendment to the constitution?

# INDEX


| | PAGE |
|---|---|
| Questions Presented for Review | i |
| Judgment and Opinion below | 1 |
| Jurisdiction of this court | 2 |
| Constitutional Provisions and Statute Involved | 2 |
| Raising the Federal Questions Below | 3 |
| Statement of the Case | 4 |
| Statement of Facts | 6 |
| Reasons for Granting Writ | 7 |
| Prefatory Statement | 7 |
| Conclusion | 30 |

Appendices:

| | |
|---|---|
| Appendix A—Order of the Appellate Court of Illinois First District | App. 1 |
| Appendix B—Order of Illinois Supreme Court denying petition for leave to appeal | App. 5 |
| Appendix C—Jury demand | App. 7 |
| Appendix D—Complaint 77L 10954 (Excerpts on Fraudulent Concealment) | App. 8 |
| Appendix E—Harvey letter to Connor 3/20/74 | App. 19 |


PREVIOUS PAGE WAS BLANK

## AUTHORITIES CITED

*Cases*

PAGE

Anderson v. Laybeck, 154 N.E.2d 205, 15 Ill. 2d 227 (1958) ..... 16

Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) ..... 20

Barnes v. Huffman, 3 Dist. (1903) App. Ct. of Ill. Vol. 113, p. 226, 228 ..... 16

Birmingham City Corp. v. General Electric, 315 F.2d 306 ..... 15

Carey v. Piphus, 98 S. Ct. 1042 (1978) ..... 26

Citizens Savings & Loan v. Fisher, 67 Ill. App. 2d 315, 214 N.E.2d 612 (1966) ..... 16

Curtis v. Loether, 415 U.S. 189, 90 S.Ct. 740 ..... 28

Fortune v. English, 226 Ill. 262 ..... 12

Grundy County Nat. Bank v. Westfall, 301 N.E.2d 28, 13 Ill. App. 3d 840 (1973) ..... 7, 16

Haines v. Kerner, 92 S. Ct. 963, 654 (1971) ..... 23

Henderson v. Sears, 495 F. 2d 513 (1974) ..... 17, 29

Holmberg v. Armbrecht, 66 S. Ct. 582 (1946) ..... 15

Huffman v. Gould, 64 N.E.2d 773, 327 Ill. App. 428 (1946) ..... 17

In Re Gault, 94 S. Ct. 415 U.S. 61 (1974) ..... 21

Kohler v. Wooleen, Brown, Hawkins, 15 Ill.App. 3d 455, 304 N.E.2d 677 (1973) ..... 17, 29

Neel v. Magana, 6 Cal.3d 176, 98 Cal.Rpt. 837, 491 P2d 421 S. Ct. (1971) ..... 16, 29

PAGE

Ney v. Yellow Cab, 2 Ill. 2d 74, 51 ALR2d 624, 117 N.E. 2d 74 (1954) ..... 27

Pennington v. Jones, 46 Ill.App. 3d 65, 3d Dist. 76-223 (1977) ..... 17, 28

Pettigrew v. Nat. Accounts System, 67 Ill. App.2d 344, 213 N.E.2d 778 (1966) ..... 24

Prudential Oil v. Phillips Petroleum, 392 F.Supp. 1018 (1975) ..... 27

Public Taxi v. Barnett, 44 Ill. App. 3d 452 (1976) ..... 10, 28

Rosenbaum v. Rosenbaum, 38 Ill.App. 3d 1, 14 (1976) .. 13

Ross v. Bernhard, 90 S. Ct. 740 (1970) ..... 28

Trucking Unlimited v. Calif. Motor Transport, 92 S.Ct. 609 (1970) ..... 25

Wegener v. Anna, 296 N.E.2d 589 (1973) Ill. App. 3d 316 ..... 10, 28

OTHER AUTHORITY

Practicing Law Institute Vol. II (Professional Malpractice (1967) IA-15, IA-21 ..... 22-23, 24

Robson, The Attorney in XVIII England (1st Ed. 1959) 21

ABA Canon of Professional and Judicial Ethics
Ethical consideration 2:28 ..... 22
Preamble ..... 26

54 CJS § 399, 400 ..... 17, 27

51 Am Jur. § 448 ..... 17, 27

Illinois Rules of the Supreme Court,
Rule 61 (b, C-1) ..... 25
Rule 61 (c-3) ..... 26

# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

---

## NO.

---

**BETTY SANDER HARVEY,**

*Petitioner,*

vs.

**CHARLES D. CONNOR,**

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT

---

Petitioner, Betty Sander Harvey, respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the Appellate Court of Illinois, First District, affirming dismissal of Petitioner's Complaint, entered in this case on June 25, 1980.

### JUDGMENT AND OPINON BELOW

On June 25, 1980 the Illinois Appellate Court, First District entered its order affirming dismissal of Petitioner's Complaint No. 77L 10954 which was entered in the Circuit Court of Cook County on May 11, 1978. A copy of the Appellate Court's order is attached hereto as Appendix A. A timely petition for leave to appeal to the Illinois Supreme Court was denied on December 2, 1980 (N . 53832) (Appendix B).

## JURISDICTION OF THIS COURT

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on December 2, 1980. The petition for Writ of Certiorari is filed within 90 days from said denial. Jurisdiction of this court is invoked under Title 28, U.S. Code, Sec. 2106 and 28 U.S. Code Sec. 1257 (3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1 . . . (N)or shall any State deprive any person of . . . property . . . without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Seventh Amendment to the United States Constitution provides in part:

> In suits at common law where the value in controversy exceeds $20.00 the right of trial by jury shall be preserved.

Constitution of the State of Illinois (1970 Article 1 Bill of Rights provides in pertinent part:

> No person shall be deprived of . . . property without due process of law, nor be denied equal protection of law.

Ill. Rev. Stat. (1975) ch. 110, sec. 45 (2):

> If a pleading or division thereof is objected to by motion to dismiss . . . because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

Ill. Rev. Stat. (1975) ch. 83, sec. 23:

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto the action may be commenced at any time within five years after the person entitled to bring suit discovers that he has such cause of action.

Ill. Rev. Stat. (1975) ch. 110, sec. 48(3):

> If a material and genuine disputed question of fact is raised in a motion to dismiss, the court shall deny the motion, if the action is one at law, and a jury demand has been filed by the opposite party in apt time.

Ill. Rev. Stat. (1975) ch. 83, sec. 16:

> . . . actions on unwritten contract, expressed or implied, or on awards of arbitration or to recover damages for an injury to property real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all Civil Actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

## RAISING THE FEDERAL QUESTIONS BELOW

In her brief to Appellate Court, Petitioner raised the issue of denial of due process resulting from attorneys acting against her interest, and those who refused to take the case. In reply brief she raised issue that unwarranted dismissal of her complaint denied her the right to offer proof, her day in Court, Civil Rights to due process, provided by U. S. C. Amendment 14, which trial court has duty to protect. She also argued these matters in Appellate Court.

The Appellate Court disregarded the Federal Questions making no finding.

In Petition to Appeal to the Illinois Supreme Court, Petitioner raised the issues: That all citizens should have equal protection of the law, and courts should not be allowed to deny same as they have duty to uphold law and the United States Constitution. That Petitioner has been denied equal protection by court's improper dismissal of her complaint as barred by the 5 year statute. That courts cannot nullify statute prescribing a limitation upon the time within which cause of action can be commenced, and to do so is to deny Constitutional rights. That even when

a law is impartial in appearance and fair on face the 14th Amendment is violated, when law is administered with evil eye and unequal hand . . . which the court did, making illegal discrimination between plaintiff and others relying on statute. That Petitioner's right to sue and give evidence has been preempted by the court's illegal dismissal of her complaint. That by misapplying 5 year statute and disregarding appropriate statutes (ch. 83, sec. 23 and ch. 110, sec. 48(3) the court denied Petitioner equal protection and benefit of law and proceedings. That Petitioner had been denied her constitutional rights under Amendment 7. The Illinois Supreme Court refused to address the Federal Questions by denying Petition to Appeal.

## STATEMENT OF THE CASE

Petitioner Harvey filed suit 77L 10954 pro se against defendant Connor, along with a jury demand (App. C). Before hearing, and with leave of court, Harvey amended such suit twice. The second amended Complaint, pertinent herein, alleges 20 counts of fradulently concealed legal malpractice, 7 counts of fraud and breach of contract. Harvey resorted to acting pro se after 6 lawyers she retained perpetuated Connor's concealments and aligned themselves with her adversaries, . . . more than forty other lawyers refused to prosecute legal malpractice, . . . and all other areas for legal aid denied assistance.

Connor filed Motion to Dismiss which failed to comply with statutory provisions. It alleged 1.) That the 28 counts all failed to state a cause of action, 2.) and were barred by Ill. Rev. Stat. (1975) ch. 83 Sec. 16 the five year limitation.

Harvey filed her objections to Motion to Dismiss stating: 1.) that allegations were sufficient, 2.) that fradulent concealment which is set forth in the complaint tolls the statute, 3.) that proper statute was Ill. Rev. Stat. (1975) Ch. 83 Sec. 23., 4.) that 7 counts of complaint allege

fraud, and one breach of written contract which is governed by the ten year statute, Ch. 83 Sec. 17. Thus material and genuine disputed questions of fact were raised.

At hearing on such motion, Harvey argued Connor's concealments and filed 13 exhibits attesting thereto. She also argued sufficiency of Complaint. Defendant presented no evidence or argument to refute the concealment or substitute insufficiency. The court entered order granting dismissal, giving no reason, thereby deciding disputed questions of fact in Motion to Dismiss when the Complaint was one at law and filed for jury . . . which Ill. Rev. Stat. (1975) Ch. 110 Sec. 48(3) prohibits. Report of Proceedings verifies the court; misrepresented the law to Harvey, refused to advise Harvey wherein her complaint failed, or give reason for dismissal, did not conduct an orderly hearing and exhibited prejudicial behavior.

Harvey's Motion to Vacate was denied. She appealed arguing both statute of limitations and sufficiency of complaint and raising the question of breach of her constitutional rights. The Appellate Court upheld dismissal, Justice Seymour Simon writing opinion, holding that all 28 counts were barred by Ill. Rev. Stat. (1977) Ch. 83 Sec. 16 the 5 year statute, without establishing the date on which the statute began to run, in any and all of the 28 counts . . . and that the Family Agreement was not a contract. Details of the court's faulty application of statute are fully set forth in point 1-B of argument which follows. Especially see references to concealment and discovery dates (p. 8 infra and App. D.)

On August 8, 1980 Harvey filed an Appeal to the Illinois Supreme Court. On December 1, 1980 the same Seymour Simon who wrote the Appellate opinion took office as a justice of the Illinois Supreme Court. On December 2, 1980 the Illinois Supreme Court refused to review the case.

## STATEMENT OF FACTS

The Opinion of the Appellate Court is based on rationally insufficient reasoning and evidence, and is totally deficient in legal substantiation. Such opinion disregards the following facts:

> (1) That Complaint was filed for Jury; (2) That cause of action was legal malpractice; (3) That Complaint has 7 counts of fraud; (4) That Complaint has 50 references to fraudulent concealment alleging discovery in 1976-77; (5) That fraudulent concealment tolls the statute; (6) That questions of Statute of Limitations, concealment and other disputed facts are for jury decision; (7) That such questions cannot be decided in Motion to Dismiss; (8) That question: "whether Family Agreement was a contract" was for the jury; (9) That a specific discovery date must be established in each of the 28 counts of Complaint in order to determine whether it is barred by the statute of limitations; (10) That each count of a complaint is a separate cause of action and separate findings must be made on each; (11) That the Medical Malpractice case he cited no relevance; (12) That Appellate Court has an obligation to protect a litigant's Federal Constitutional rights.

The court's Opinion is primarily dicta . . . a devious document designed to deceive and mislead, and is an affront to the judicial process. Dismissing a 28 Count Complaint, in one fell swoop as barred by the 5 year statute of limitations without establishing when the cause of action accrued in a single Count, is a flagrant perversion of justice.

## REASONS FOR GRANTING WRIT

### Prefatory Statement

The Appellate Court concludes: (App. pp. 1, 2)

> . . . the *fraud* (emphasis added) occurred in 1970 and 1971 taking as true, all the well-pleaded allegations of the complaint. This suit was not filed until June, 1977, more than 5 years later. . . . all counts are subject to a limitation period of 5 years (Ill. Rev. Stat. 1977, Ch. 83 Sec. 16).

What type of logic is this? Petitioner's 28 count complaint contains 7 counts of fraud, more than 50 references to fraudulent concealment supported with 15 exhibits, and sets forth discovery dates primarily in 1976 and 1977. Ill. Rev. Stat. (1975) Ch. 83 Sec. 23 provides, when an action is fraudulently concealed the statute is tolled until discovery.

In *Grundy County National Bank* v. *Westfall,* the court held that:

> The statute of frauds which has as its purpose the prevention of fraud will not be permitted to be used to accomplish a fraud and if facts are such that it would be a virtual fraud to interpose statute, the court will not listen to that defense.

The court not only listened, it condoned the fraud.

In its desperate attempt to dispose of Petitioner's legal malpractice complaint the court entered into convoluted dicta to "justify" its action. (App. p. 2) The court suggests that Petitioner failed to file suit on the "general knowledge" she had of defendant's disloyalty in 1974. Can lawsuits be filed on "general knowledge of disloyalty?" The letter cited to verify Petitioner's knowledge (App. F) actually verifies that on March 20, 1974 defendant was still concealing all knowledge and documents from Petitioner.

The court states "when Harvey discovered she had a cause of action, there remained time within the regular 5 year limitation period for her to file suit." What is the basis for the court's conclusion, when it failed to determine the discovery date on a single one of the 28 counts? The court cites *Anderson* v. *Wagner*, a medical malpractice suit which is on Appeal to the United States Supreme Court. Applicable cases are *Neel* v. *Magana*, *Henderson* v. *Sears* and *Kohler* v. *Wolleen, Brown & Hawkins* all Legal Malpractice decisions, which affirm that "discovery of lawyers' wrongful acts begins the running of statute."

The court grasps at every straw to protect the now deceased Connor from the consequences of his wrong, even suggesting that Petitioner's subsequent lawyers be held accountable. However, the only issue before the Appellate Court was the propriety of the dismissal of Petitioner's 28 count complaint (an action at law, alleging fraud and fraudulent concealment of defendant's wrongs committed primarily in 1970-71 and discovered primarily in 1976-77), wherein genuine issues of disputed fact were raised and the complaint was filed for jury. *Ill. Rev. Stat.* (1973) Ch. 110 Sec. 48(3) specifically states under these circumstances, dismissal must be denied.

The court's decision is irrational, illogical, unsound and contrary to the law. Is there no protection in the courts for one who has been wronged by lawyers?

Certiorari should be allowed to resolve the important issues raised herein, important not only to Petitioner, but to all of us. For where complaints can be removed from adjudication of issues by a jury through the improper granting of Motion to Dismiss, achieved by misapplication of the wrong statute of limitations . . . by courts that wink at fraud, mold the law to suit their purposes, and preempt the prerogatives of the jury . . . who indeed can be secure in his property, or person.

Can elastic laws be the frame work of justice?

## I.

**DISMISSAL OF PETITIONER'S COMPLAINT IS SO LACKING OF RATIONAL SUBSTANTIATION IN LAW AND EVIDENCE AS TO RENDER SUCH DISMISSAL VIOLATIVE OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS, AND REPUGNANT TO JUSTICE, WHERE THE COURTS HAVE DISREGARDED ALL STATUTORY REQUIREMENTS AND LEGAL GUIDELINES FOR GRANTING MOTION TO DISMISS, HAVE NOT REQUIRED DEFENDANT'S MOTION TO DISMISS TO CONFORM TO STATUTORY REQUIREMENTS, HAVE DISREGARDED THE FACT THAT THE COMPLAINT WAS BASED ON A FIDUCIARY RELATIONSHIP, TURNED THEIR BACK ON THE COMPLAINT'S 50 REFERENCES TO FRAUDULENT CONCEALMENT AS WELL AS DISCOVERY DATES SET FORTH THEREIN, WRONGFULLY DECIDED MATERIAL AND GENUINE DISPUTED QUESTIONS OF FACT IN MOTION TO DISMISS, FAILED TO CONSIDER THAT THE COMPLAINT WAS FILED FOR JURY HEARING, FAILED TO CONSIDER PETITIONER'S EVIDENCE OF CONCEALMENT, REQUIRED NO EVIDENCE FROM DEFENDANT TO SUPPORT HIS DEFENSE OF STATUTE OF LIMITATIONS, GRANTED DISMISSAL WITHOUT DETERMINING THE DATE ON WHICH THE STATUTE BEGAN TO RUN IN ANY OF THE 28 COUNTS OF COMPLAINT AND IN OTHER WAYS ACTED CONTRARY TO STATE AND FEDERAL LAW AND STATUTES.**

### A. There Was No Basis In Law For The Trial Court's Dismissal Of Petitioner's Complaint.

There is no justification for the trial court's dismissal of petitioner's complaint.

Defendant's motion should not have been considered by the court since it failed to state the statute under which it was brought, and failed to comply with *Ill. Rev. Stat.* (1975) ch. 110 sec. 45(1, 2) which requires that defects in complaint must be specifically and explicitly set forth.

It also based its plea for dismissal on a dichotomy stating:

> Wherefore, the second amended complaint at law and each of its 28 counts fails to state a cause of action, and the allegations referred to therein are conduct committed more than five years prior to the filing of this lawsuit, and accordingly are barred by Ch. 83, Sec. 16 of the *Ill. Rev. Statutes.*

It is elementary that if there is no cause of action stated, no statute can be applied. The court considerately overlooked these discrepancies for defendant just as it overlooked the fact that the complaint was filed for jury. In *Wegener* v. *Anna,* 296 N.E.2d 589, 591, Ill. App. 3d 316, 319 (1973) the court ruled:

> Trial by Jury is a constitutional right. Dismissal is not available on discretion.

*Public Taxi* v. *Barnett,* 44 Ill. App. 3d 452, 456 (1976) is a malpractice suit alleging negligence, wherein the court granted a directed verdict in defendant-lawyer's favor, removing the case from jury. On appeal the court held:

> In suit charging negligence and legal malpractice it is plaintiff's burden to plead and prove not only that defendant was negligent, but that negligent conduct was proximate cause of alleged injury, and where plaintiff presented evidence sufficient to raise questions as to such issue, jury should have been allowed to resolve them.

Petitioner's complaint and exhibits were sufficient to raise questions as to defendant's fraudulent concealed negligence and fraud causing injury, and the jury should have been allowed to resolve them.

With more than 50 references to fraudulent concealment, and discovery dates set forth primarily between 1976 and 1977, obviously the proper statute was *Ill. Rev. Stat.* (1975) ch. 83, Sec. 23 which deals with concealment, not *Ill. Rev. Stat.* (1975) ch. 83 sec. 16 as set forth in Motion to dismiss.

Petitioner argued the matter of fraudulent concealment at hearing on motion to dismiss, filing more than 12 supporting documents. Report of proceedings shows:

R6 Mrs. Harvey:

> I allege concealment in every one of the counts. . .

R8 Mrs. Harvey:

> All through the complaint I have listed them, if your Honor would like to refer to them. . . .

References and exhibits are found in the Report: R 10 through 22.

The court then misrepresented law to pro se Petitioner:

> The Court: And secondly you get to the question of the statute of Limitations, it isn't when you became aware of it. It's when the injury occurred, not when you learned that you have a cause of action against somebody.
>
> Mrs. Harvey: I understand your position your honor, however the statute of frauds on concealment is very clear, that if a man conceals documents from me which are crucial to the case and pertinent to the issues. . .
>
> The Court: (interrupting) Yes, but I don't know that there is a standard that the lawyer must furnish you with copies of all the exhibits and everything else.
>
> Mrs. Harvey: Your Honor, I'm not asking for that. I've got. . . .
>
> The Court: (interrupting) That's what your complaint says, *he hid all this stuff.*

The court would not allow petitioner to set forth the facts and law on attorney's fraudulent concealment, by constantly interrupting her but did acknowledge the concealment allegations.

After misrepresenting the law on discovery, the court misrepresented to Petitioner that it was not incumbent upon an attorney to advise his client of everything. Ironically in *Fortune* v. *English*, 226 Ill. 262 the case defendant cited as his own, the court held:

> Relation of attorney client requires full disclosure by attorney of all matters within the scope of his employment.

The court tried to mitigate Petitioner's allegations of concealment stating lawyers didn't have to furnish "exhibits and everything." The fact is Harvey's allegations of concealment refer to concealments of legal documents, fact and law, misrepresentation of title to real estate, assets in estate, heirship, value of securities, residency laws, etc.

Since the Motion to dismiss was built on shifting sand, the Trial Court was unwilling to go on record as to the reason for dismissal. The order gives none.

Report of proceedings shows:

> The Court: Your complaint is deficient in every way.
>
> Mrs. Harvey: Your Honor may I ask in what way is the complaint deficient . . if it's deficient. . . .
>
> The Court: Well, its my opinion that you don't have a good complaint . . . I don't think you can make a good complaint.
>
> Mrs. Harvey: I'll provide a Bill of particulars. . .
>
> The Court: I don't have to go specifying the reasons for an action. I don't think that is required.
>
> Mrs. Harvey: May I ask one question, your Honor, I don't mean to be. . I'm just trying to find what is wrong . . .
>
> The Court: I'm not conducting a class in law.
>
> Mrs. Harvey: I understand your not. . . .
>
> The Court: I've given an order, I don't think you know how to run a law suit and I don't think you have a good complaint, and unless you get yourself a lawyer. . . (R30)

The trial court did not dismiss Petitioner's complaint for statutory reasons, nor by law, but for the arbitrary and prejudicial reason that the court's opinion was that it was not a good complaint, and that petitioner could make a good complaint.

*Illinois Rev. Stat.* (1975) ch. 110 sec. 43(2) provides that a complaint may have many counts—and a bad one does not affect a good one—and each count should be considered individually. In *Rosenbaum* v. *Rosenbaum,* 38 Ill. App. 3d 114 (1976) the court held:

> Each count of a complaint is separate and states a complete cause of action.
>
> Where a complaint contains separate counts there should be finding as to each count with separate judgment entered on each.

Petitioner's Complaint has 28 counts. The judge refused to hear them separately, make findings on each or enter separate judgments. Report of proceedings shows:

> Mrs. Harvey: Your Honor . . . count three . . . I thought we were going over these count by count.
>
> The Court: Well, I'm not going to spend days and days going over it. I read the complaint, I read all the counts and its my opinion that you don't have a valid count here or anything.
>
> Mrs. Harvey: Count 3 . . . except for change in dates . . . is identical to the Civil Practice Form.
>
> The Court: Well, . . . Civil Practice Forms, they go to certain actions and just because a Civil Practice Form sets out something doesn't make it legal.

Unbelievably in his determination to dispose of petitioner's complaint, the court assailed the legality of the universally used Civil Practice Forms. The judge's misrepresentations were flagrant.

Report of proceedings from hearing on Motion to Vacate verifies that Petitioner continued to question the propriety of the Dismissal:

> Mrs. Harvey: Your Honor, I have been reading the Ill. Statutes, and couldn't come up with anything that would justify defendant's contention that the complaint was insufficient or that the statute had expired. It seems that each count should be considered individually and that defendant's motion was not sufficient because it was in generalities . . . that I'm entitled to know in which way my pleadings are insufficient.

The Court simply told Petitioner to take the matter to the Appellate Court.

> The Court: That's one thing the Appellate Court is there for. They will be very happy to resolve it and decide whether I was right or wrong. (R40)

But the Appellate Court apparently was not eager to accept this hot potatoe from the trial court. It took them one year from date of oral argument to build their opinion. It affirmed dismissal . . . not on the insufficiency of the complaint, but for reason that all 28 counts were barred by the five year statute of limitations.

**B. This Court Need Not Accept The Appellate Court's Misapplication Of The Five Year Statute Of Limitations To A 28 Count Legal Malpractice Complaint Which Sets Forth 50 Specific Allegations Of Fraudulent Concealment As Well As 7 Counts Of Fraud And Breach Of Written Contract.**

Ill. Rev. Stat. (1975) ch. 83 sec. 23 states:

> When a party liable to an action fraudulently conceals the knowledge from the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the suit discovers that he has such cause of action.

This is the proper statute by which to measure the allegations in Petitioner's complaint, and the impropriety

of the application of Chap. 83 Sec. 16. Such complaint is 42 pages in length, and contains 28 counts. In the interest of simplifying review, since the sufficiency of the complaint is not in dispute, but only the question of the statute of Limitations, petitioner has filed excerpts which deal with concealment, instead of the entire complaint. They are set forth in Appendix D in detail and are listed below as follows:

Count I par. 4
Count I par. 11, 7
Count II par. 10
Count III par. 8, 9, 12
Count IV par. 7, 12
Count V par. 13, 16
Count VI par. 14, 17
Count VII par. 7, 8
Count VIII par. 7, 8
Count IX par. 13, 14, 15, 16, 18, 19
Count X par. 11
Count XI par. 16, 19
Count XII par. 8, 9
Count XIV par. 10, 12
Count V par. 15
Count XVI par. 13, 5
Count XVII par. 9
Count XIX par. 7, 8
Count XX par. 8
Count XXI par. 8
Count XXII par. 2, 8
Count XXIII par. 7, 8
Count XXIV par. 7, 8, 9
Count XXV par. 7
Count XXVI par. 11
Count XXVIII par. 27, 39, 55

This court clearly recognizes that fraudulent concealment tolls the statute. In *Holmberg* v. *Armbrecht*, 66 S. Ct. 582, 585 (1946) the court held:

> Where a plaintiff has been injured by fraud and remains in ignorance or it is without any fault or want of diligence or care on his part, the bar of statute of limitations does not begin to run until the fraud is discovered, though there may be no special circumstances or effort on part of party committing fraud to conceal it from other party.

In *Birmingham City Corp.* v. *General Electric*, 315 F.2d 306 the court held:

> The Court of Appeals is required to recognize the clear distinct explicit and unqualified statement of the U. S.

> Supreme Court that fraudulent concealment of a cause of action tolls Statute of Limitations.

There was no want of diligence on part of plaintiff. The Appellate Opinion acknowledges that. (App. A p. 3)

> The failure to file suit . . . may not have been Harvey's fault personally. She says she eventually spoke to more than 40 lawyers, looking for one who would handle her case; she has sorted through evidence many hours a week for years; and she has prosecuted her case with vigor, once she filed it.

The law is clear, regardless of cause of action, fraud tolls the statute but in matters concerning a trust relationship failure to discover fraud is excused. The principle has been consistently upheld by Ill. Appellate Court. *Barnes* v. *Huffman* 3d Dist. (1903) App. Court of Ill. Vol. 113 pp. 226, 228, *Anderson* v. *Laybeck,* 154 N.E. 2d 205, 15 Ill. 2d 227, *Citizen's Savings & Loan* v. *Fischer* (1966) 214, N.E.2d 612, 67 Ill. App. 2d 315; *Grundy Country Nat. Bank* v. *Westfall,* 301 NE2d 28, Ill.App.3d (1973). Equal protection of the law requires the principle he applied to lawyers.

In *Neel* v. *Magana,* 6 Cal. 3d 176, 98 Cal. Rpt. 837, Sp. Court (1971) the principle was explicitly set forth.

> An attorney's error may not work damage or achieve discovery until many years after the act, and the extention of liability into future poses a disturbing prospect. On the other hand, when an attorney raises the statute of limitations to exclude a client's action before that client has had a reasonable opportunity to bring suit, the resulting ban of action not only starkly works an injustice upon the client, but impugns the very integrity of the legal profession. Statute on lawyer's error does not start running until the wrong is discovered.

This discovery rule in legal mal-practice was adopted in Illinois in *Kohler* v. *Wooleen, Brown & Hawkins,* 15 Ill. App. 3d 455, 460, 304 N.E.2d 677.

In *Henderson* v. *Sears,* 495 F.2d 513 (1974) the Federal court held "the cause of action in legal malpractice accrued when misrepresentation was discovered."

The Appellate Court clearly erred, but their greatest travesty is that the issue of statute of Limitations was for the jury to decide.

54 CJS §§ 399, 400:

> Where facts are in doubt or dispute, the question whether an action is barred by the statute of limitations is one of fact to be determined by the trier of fact, the jury.
>
> Ordinarily the existence of discovery of fraud, mistake concealment or trust relation presents question of fact to be determined by jury.

51 Am Jur § 448 provides:

> In accordance with established general rules of questions of fact, relating to pleas of statute of Limitation are for jury to determine. What constitutes reasonable diligence to discover fraud so as to affect time where statute begins to run is question for jury.

The principle that statute of Limitations being a question for jury was upheld by the Ill. App. Court in *Huffman* v. *Gould,* 64 N.E.2d 773, 327 Ill.App. 428, 437, 439 (1946).

Cleverly and intentionally, the Appellate Court in the instant case does not acknowledge that the complaint was filed for jury. But the Opinion's silence does not alter the fact that the jury demand was filed with the original complaint. *Pennington* v. *Jones,* 46 Ill. App. 3d 65 3d Dist. #76-223 is a particularly analagous case. It involves a lawyer/client relationship, genuine issues of disputed fact

existed and the party opposing the Motion to Dismiss had filed a timely jury demand. (all elements of the instant case.) Motion to dismiss was granted and plaintiff appealed. Even though the Appellee failed to file appellate brief, the court reversed dismissal stating:

> Trial court improperly granted defendant's motion to dismiss complaint alleging failure of defendant lawyer to adequately represent plaintiff . . . where plaintiff filed a jury demand and action at law involved a fiduciary relationship between attorney/client in that attorney agreed to represent plaintiff . . . but failed to do so adequately.

upholding *Ill. Rev. Stat.* (1975) ch. 110 Sec. 48(3):

> Where material and genuine question of fact is raised in action at law where a jury demand has been filed by party in opposition to Motion to Dismiss, the court must deny the motion.

The Appellate Court instead wrongfully decided the following questions of disputed fact, which were for jury:

1. Whether the family Agreement was a contract (App. pp. 1, 2)

2. Whether fraudulent concealment tolled the statute (App. pp. 1, 2, 3)

3. Whether petitioner had been diligent (App. p. 3).

This Court should not, and must not accept this miscarriage of justice.

The opinion is primarily dicta, but is cleverly devised to mislead the reader.

1. (App. A p. 1) "Taking as true, all well-pleaded allegations of complaint the fraud occurred in 1970 and 71 principally in 1971. This suit not filed until June 1977 more than 5 years later." What the court fails to state is

that the well-pleaded allegations of complaint give discovery dates primarily as 1976 and 1977.

2. Opinion (App. A, p. 3) "failure to file suit within proper time may not have been Harvey's fault . . . according to Harvey delay was caused by attorneys who took case and promised to sue but did not." This statement is a distortion of facts. Harvey alleges failure to sue was not due only to failure of attorneys to bring suit but to the fact that such lawyers perpetuated Connor's concealments, misrepresented law and secreted documents so Petitioner did not know she had cause of action against Connor. Further Harvey's complaint was timely filed under Ill. Rev. Stat. (1975) ch. 83 sec. 23.)

3. (App. A, p. 2) Referring to a letter plaintiff wrote the court states: "It is clear that as early as March 1974, Plaintiff knew in *general terms* of Connor's disloyalty she now complains of though *details may have come to light later.* . . . It is also clear she knew she *could sue for such conduct.*" (emphasis added). Lawsuits cannot be filed and sustained *on general terms of disloyalty!* The Court also fails to set forth any date on which the details on concealment *came to light.* The letter quoted (App. E) actually sustains Petitioner's allegations of concealments, as it requests that Petitioner be allowed to see ten specific areas of records which were pertinent to the probate proceedings, and in determining or confirming Petitioner's suspicions that Connor had concealed wrongful acts of others as well as his wrongful acts. As plaintiff's exhibits attest Connor did not comply.

4. (App. A, p. 3) "We conclude that when Harvey discovered she had a cause of action there remained within regular 5 year limitation period time for her to file suit. Such conclusion is not only faulty it is ludicrous, and the

sole case cited to substantiate this theory, *Anderson* v. *Wagner* (1979) 79 Ill. 2d 295, 322, 402 N.E.2d 560 concerns medical malpractice and is currently on appeal to the U.S. Supreme Court. In order to determine dismissal by statute of Limitations a definite date must be established where on the statute began to run. The Court failed to establish such date on a single one of the 28 counts. While Petitioner's complaint clearly sets forth discovery dates primarily between 1976 and 1977. How could time remain within the regular limitations statute when by Court's own opinion (App. A, p. 1) "the fraud occurred in 1970 and 1971"?

**C. The Decision Of The Illinois Supreme Court To Deny Harvey's Petition For Appeal Could Not Have Been An Objective One.**

Petitioner filed her appeal to the Illinois Supreme Court on August 18, 1980 setting forth all the hereinbefore set forth facts and law.

On November 10, 1980 Judge Seymour Simon, author of opinion, was elected to the Illinois Supreme Court replacing Justice Thomas Kluczynski.

On December 1, 1980 Justice Simon was sworn in and assumed his role as a justice in the Illinois Supreme Court, even though the mandate does not reflect his presence.

On December 2, 1980, the justices of the Illinois Supreme Court voted to deny Harvey's petition to Appeal, rendering no opinion, and refusing to examine the Federal Constitutional questions raised therein. Thus they declined to review the unlawful opinion of one of their own justices thereby condoning the wrongful dismissal of Petitioner's complaint, failing to uphold the judicial code, Illinois law and statutes, and Petitioner's Civil Rights. Could the Court be objective under the circumstances?

## II.

**PETITIONER HAS BEEN DEPRIVED OF A FAIR AND IMPARTIAL HEARING, HER DUE PROCESS OF LAW, HER RIGHT TO EQUAL PROTECTION OF THE LAW AND HER RIGHT TO TRIAL BY JURY, WHICH ARE ACCORDED BY UNITED STATES CONSTITUTION AMENDMENTS FOURTEEN AND SEVEN.**

**A. Can Due Process Either Procedural Or Substantive Be Achieved When A Plaintiff's Cause Of Action Is Legal Malpractice And When She Has Been Obliged To Act Pro Se Because Her Cause Of Action Is Legal Malpractice?**

*In re Gault*, 94 S.Ct. (1974), 415 U.S. 61 the court held:

> A litigant needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts, to insist upon regularity of the proceedings, to ascertain whether he has a case and to prepare and submit it.

The court put no qualification on the type of litigant or lawsuit. Clearly every person who is obliged to solve a problem through legal channels needs the assistance of counsel . . . just as every person in need of an operation requires the assistance of a doctor, preferably a surgeon. Petitioner acknowledges her need. She has paid in excess of $20,000 to the seven attorneys who contracted to represent her, . . . and then worked against her.

This problem is not new. In *Robson*, the Attorney in XVIII Century England (1st Ed. 1959) the author quotes from "an Apology for the Conduct of Mrs. T. C. Phillip" 111, 118 (1750):

> If a dishonest attorney should think fit to betray his clients, sell them to their adversaries, do anything in their cause that is contrary to their interest, pray what remedy do they have? Why to employ another attorney to call him to account . . . who will do the very same, ad infinitum.

Petitioner has interviewed more than 50 lawyers seeking help, in addition to those she retained. All refused to take her case . . . because her cause of action is *legal malpractice* . . . and she is the PLAINTIFF . . . though the Judicial code, Ethical Consideration 2:28 states:

> The personal preference of a lawyer to avoid adversary alignment against another lawyer, does not justify his rejection of tendered employment.

Many of those interviewed by Petitioner openly stated they did not handle malpractice, except for defense. Petitioner has sought help from legal clinics public and private, law schools, legal aid and bar association referral . . . to no avail. If petitioner were a criminal, she would have court appointed counsel. If petitioner were on welfare she would have legal aid.

Petitioner is neither. She is a law-abiding middle class American citizen whose property has been wrongfully usurped, and she has been betrayed by attorneys she retained to recover such property. Now she has been denied her day in court by the "relationship between bench and bar which inevitably influences judicial attitudes". Practicing Law Institute Vol 11 Professional Malpractice (1967) IA-15. At IA-21 of this Volume it is stated:

> The majority of decisions reflect a superficial analysis, that is most certainly colored by the fraternal concern of the judiciary for members of the practicing bar.

The instant case clearly supports this finding.

Attorneys have a favorite cliche: He who represents himself, has a fool for a client. Petitioner submits even a wise man is treated like a fool, supra pp. 11, 12, 13 and App. A, when forced to represent himself or abandon all hope for justice. The courts and lawyers insist the pro se status is by *choice*.

Petitioner acknowledges her complaint may not meet the technical perfection of one drawn by an attorney, but in *Haines* v. *Kerner,* 92 S. Ct. 963, 404 U.S. 519, 30 L.Ed. 2d 652 this court held:

> Allegations of a pro se complaint should be held to less stringent standard than formal pleadings drafted by lawyers.

However, though the trial court contended that it did not think it was a good complaint it did not point out a single defect, and the Appellate Court finding no justifiable reason for dismissal, misapplied the wrong statute of limitations to get rid of Petitioner's cause of action. This is not the first of Petitioner's Jury Demand complaints to fall by misapplication of the wrong statute of limitations, on Motion to Dismiss. In the hands of an Illinois judge, who is determined to protect a lawyer, the statute of limitations has become a guillotine.

It is most difficult to act pro se. Even when petitioner diligently pursues knowledge in the law library searching for proper legal forms which she carefully follows, she is mislead by a judge who claims that the Civil Practice forms, are not necessarily legal (supra, p. 13) who distorts and misrepresents the law (Supra, pp. 11-13) and arbitrarily applies it. (Supra, pp. 14-20) Pro se litigants inevitably file a jury demand believing justice more often can be achieved from a jury than a judge. But here too they are thwarted, as Petitioner was by courts that dismiss a complaint for no legal reason.

In Vol. II Practicing Law Institute I A-15 E Professional Malpractice (1977) it is stated:

> Although the overwhelming majority of decisions indicate that the question of negligence is one of fact, judicial reluctance actually to submit the issue to jury is manifest in legal malpractice.

Approximately 14 counts of Petitioner's complaint, filed for jury, state breach of fiduciary duty for failing to perform certain specific tasks. What other way could the court keep the jury from deciding the issues, but to dispose of the complaint . . . even if it meant breaking the law?

Petitioner has not had equal protection of Ill. Rev. Stat. Ch. 83 Sec. 23 nor Ill. Rev. Stat. Ch. 110 Sec. 48(3), nor has Petitioner had an opportunity to be heard, or enforcement of her rights. In *Pettigrew* v. *National Accounts Systems Inc.* (1966), 67 Ill. App. 334 at 350, 351, 231 N.E. 2d 778, the court held:

> Fundamental prerequisite of Procedural Due Process is that every man shall have protection of his day in court, and benefit of an orderly proceeding according to general law or established rules, and that hearing shall not be arbitrary but shall assure to him inquiry on issues of case wherein judgment is rendered only after trial.

Petitioner's day in court was usurped by improper dismissal of her complaint. She did not have orderly proceedings according to general law or established rules, since the court constantly and persistently interrupted her in her argument, misrepresented the law, conducted the closed to shut out the commotion in the ante-room, and hearing in his chambers, refused to allow the door to be barred everyone from proceedings. Further the hearing was arbitrary in that the court did not require defendant's motion to conform the statutes, did not require defendant to prove his defense, failed to consider petitioner's argument and evidence offered to support her allegations of concealment, misrepresented the law and misapplied the wrongful statute of limitations.

In *Trucking Unlimited* v. *Calif. Motor Transport Co.*, CA 1 (1970), 432 F. 2d. 755, 92 S. Ct. 609 at 614 this court held:

> For purposes of motion to dismiss complaint, the court must take allegations of complaint at face value.

The court's Opinion clearly shows it carefully selected those allegations it would take at face value, shaping same to suit its purpose . . . (Supra, 19, 20). All allegations of concealment, discovery dates, fraud and terms of contract were totally disregarded by the court.

Ill. Rules of the Supreme Court Rule 61 Standards of Judicial Conduct provide:

> Judge should bear in mind that ours is a government of law, not men, and that his duty is the application of general law to particular instances. He should administer office with due regard to integrity of the system of law itself remembering he is not a depository of arbitrary power but a judge under law. 61 (c-1)

In this case of legal malpractice the judges failed to administer justice according to the law, and acted as a depository of arbitrary power.

United States Constitution, Amendment 14 provides:

> No person shall be deprived of life, liberty or property without due process of law.

Plaintiff's due process was initially breached when Notice of legal proceedings in the estate wherein she lost her property was not served on her. She retained defendant to protect her interest and he betrayed her. Now the courts have precluded recovery against defendant by improper dismissal of her complaint, failing to provide her with the equal protection of *Ill. Rev. Stat.* (1975) Ch. 110 Sec. 48(3) and *Ill. Rev. Stat.* (1975) Ch. 83 Sec. 23. She has thereby been denied procedural and substantive due process, and

equal protection of the laws by the very Courts that are duty bound to protect them.

> It is the duty of all judges to support federal and applicable state Constitutions. In doing so they should be fearless in observing and applying fundamental limitations and guarantees. Ill. Sup. Ct. Rules (Rule 61 c-3)

In *Carey* v. *Piphus*, 98 S. Ct. 1042 (1978) this court held:

> The right to procedural due process is absolute in the sense that it does not depend upon merits of a claimant's substantive assertions, and *because of the importance to organized society that procedural due process is observed.*

But Procedural Due Process cannot be attained unless the court upholds the laws and statutes, even when it means censuring a fellow member of the judiciary or bar. To fail to do so, is to encourage abuses in the system by unprincipled practitioners, who have already tarnished the name of an honorable profession. The preamble of the ABA Canon of Professional and Judicial ethics states:

> Since erosion of public confidence in the legal profession would inevitably undermine respect for the entire legal system it is particularly important that the public not have basis for believing that attorneys are afforded special treatment that effectively insulates them from any liability.

Current public opinion polls show that only 17% of United States citizens trust lawyers. What a pity for the thousands of honorable lawyers whose integrity is impugned by the likes of defendant and the failure of the courts to weed them out, as in the case at bar. Such actions undermine respect for the entire legal system, unequivocally substantiating the belief that lawyers are afforded special treatment which insulates them from liability . . . even after death!

And can due process be achieved when a justice is sitting in the court reviewing his opinion?

It is obvious that Petitioner has been deprived of her equal protection of the laws, her procedural and substantive due process because her cause of action is legal Malpractice . . . and because, due to this fact, she has been obliged to act pro se.

**B. The Right To Trial By Jury Is Not A Matter Of Judicial Discretion. It Is A Right Guaranteed By Our Constitution.**

United States Constitution Amendment 7 states:

> In suits at common law, where the value in controversy exceeds $20.00 the right of trial by jury shall be preserved.

The Constitution of the State of Illinois (1970) Article I, Bill of Rights § 13 provides:

> The right of trial by jury as heretofore enjoyed shall remain inviolate.

Are these empty, outmoded words or are they truly sacred rights guaranteed by the Constitution of the Nation and the State? In *Prudential Oil Corp.* v. *Phillips Petroleum Co.* (1975), 392 F. Supp. 1018, 1021 the court held that the right of trial by jury is a constitutional right . . . and that:

> The inescapable teaching of recent Supreme Court decisions is that there is a clear federal policy in light of the Seventh Amendment favoring jury trials.

With her complaint petitioner filed a jury demand. The action is one at law, and the value in controversy exceeds one million dollars. All constitutional provisions were met. Yet petitioner was arbitrarily denied jury trial. The court instead conducted a bench trial taking disputed questions of fact from the jury contrary to Ill. Rev. Stat. Ch. 110 Sec. 48(3), 54 CJS §§ 399, 400 and 51 AmJur § 448. In *Ney* v. *Yellow Cab Co.* (1954) 2 Ill. 2d 74, 51 ALR 2d

624, the court stated that the right to trial by jury is a fundamental right in the American Democratic judicial system. Why then did the Illinois Court not uphold it? In *Curtis* v. *Loether*, 415 U.S. 189, 197, 90 S. Ct. 740 the court not only held that the right to trial by jury is constitutional but that:

> Right of trial by jury provided in 7th Amendment extends beyond the common law forms of action recognized at the time of amendments adoption.

Clearly, petitioner should have had her jury trial.

*Public Taxi Service* v. *Barnett* (supra p. 10) is a legal malpractice suit wherein defendant lawyer was awarded a directed verdict. On Appeal the court reversed in favor of plaintiff stating that jury should have been allowed to resolve the issues.

*Pennington* v. *Jones* (supra p. 9) is another legal malpractice suit filed for jury wherein summary judgment in favor of defendant was reversed by the appellate court for essentially the same reason. In *Ross* v. *Bernard*, 90 S.Ct. the court also upheld the right to trial by jury in breach of confidential relationship.

In *Wegener* v. *Anna* (supra) the court ruled:

> Right of trial by jury in cases at law is a constitutional right. Dismissal is not available as a notion or discretion.

It is well established, in both Federal and State Courts, that the right to trial by jury is a Federal Constitutional Right under circumstances set forth in the 7th Amendment. Petitioner's Complaint met all of the requirements. There was no basis in law for Illinois courts to deny the right to jury trial by dismissal.

* * * *

The rationale of the foregoing conduct of the court conflicts with all established principles of justice. The court's order (App. A) fails to establish a single date on which the running of the statute of limitations began, yet barred the complaint by the five year statute. Each Count should have a separate finding. They were all dismissed, arbitrarily with no findings on the merits of each.

Certiorari should be allowed so this court may once more reiterate the discovery rule set forth in *Henderson* v. *Sears, Neel* v. *Magana,* and *Kohler* v. *Wolleen Brown & Hawkins,* in principle and application; for it appears that the reviewing courts in Illinois currently do violence to the just rule that an attorney who has committed fraud, cannot hide behind the statute of limitations.

Moreover this case demonstrates that the Courts have disregarded the law (point 1, 2) as well as the provisions of the United States Constitution, which conduct poses a serious problem to the administration of justice which this court should note and remedy.

Certiorari should be granted to prevent a devastating injustice.

## CONCLUSION

For any or all of the reasons above set forth, certiorari should be allowed; and upon consideration of the substance of petitioner's arguments, dismissal of her complaint should be reversed.

Respectfully submitted,

BETTY SANDER HARVEY

# APPENDIX

**APPENDIX A**

Third Division

June 25, 1980

---

78-1454

BETTY SANDER HARVEY (a/k/a Davis),
Plaintiff-Appellant,

vs.

CHARLES DEAN CONNOR,
Defendant-Appellee.

---

Appeal from the Circuit Court of Cook County.
Honorable David A. Canel, Presiding.

---

Mr. JUSTICE SIMON delivered the opinion of the court:

The plaintiff, Betty Sander Harvey, charges her former attorney, defendant Charles Dean Connor, with legal malpractice. The circuit court judge dismissed the complaint on Connor's motion, which, among other matters, raised a statute of limitations defense. Harvey appeals. We affirm.

Connor was hired to protect Harvey's interests in a family dispute over her father's estate. The complaint, filed *pro se* and running for forty pages, in twenty-eight counts, is difficult to follow; but there is no need to go into detail here. In brief, the accusation is that Connor helped some of Harvey's relatives and their lawyers loot the estate and defraud the plaintiff.

We do not condone the circuit court judge's refusal to explain the grounds for his order dismissing the complaint,

but Harvey could never have cured the flaw in it. Her cause of action is barred by the Statute of Limitations.

Taking as true all the well-pleaded allegations of the complaint, the fraud occurred in 1970 and 1971, principally 1971. This suit was not filed until June 1977, more than 5 years later.

A few of the counts of the complaint are for breach of a written contract. The applicable limitations period for an action based on a written contract is 10 years. (Ill. Rev. Stat. 1977, ch. 83, par. 17.) The contract relied upon is entitled "Family Settlement Agreement"; it states on its face that it is an agreement between the plaintiff, her sister, and their father's widow. These three are referred to throughout the Agreement as "the parties"; and the Agreement recites that "each of the parties hereto acknowledge that in the formulation of this agreement they have been represented by their respective counsels—Emma Sander by Philip S. Makin, Betty Sander Davis [the plaintiff], by Charles Dean Connor, and Marjorie H. Sander by Joseph J. LaRocco." The Agreement, which was designed to resolve the dispute about the estate, contemplated that the lawyers for the parties would do various things to bring in more money to be divided among the family members. Each lawyer signed the Agreement opposite his client's name. But they were not parties to it, or legally obligated by it. Thus, the complaint does not include valid counts based on a written contract.

All the other counts of the complaint are subject to a limitations period of 5 years. (Ill. Rev. Stat. 1977, ch. 83, par 16.) The plaintiff attempts to counter the limitations problem by alleging that Connor fraudulently concealed the cause of action from her, giving her 5 years from when she discovered it to file her action. Ill. Rev. Stat. 1977, ch. 83, par. 23.

Our supreme court recently held that if at the time a plaintiff discovers fraudulent concealment a reasonable time remains within the normal limitations period, the fraudulent concealment provision of the Limitations Act does not apply and the plaintiff must file suit within the normal period. *Anderson* v. *Wagner* (1979), 79 Ill. 2d 295, 322, 402 N.E.2d 560.

Harvey discharged Connor in June 1974, and 4 months later she lodged a complaint against him with the Illinois Attorney Registration and Disciplinary Commission. She charged at that time, in some detail, that he had defrauded her by misrepresentation and coercion, had colluded with her adversaries, and had refused to answer her inquiries about his conduct—allegations duplicated by her complaint in this case. As early as March of 1974, in a letter Harvey wrote to Connor, she described herself as "shocked" at his conduct, and asked, "What kind of charade are you playing?" It is clear, therefore, that the plaintiff at least as early as March 1974 knew in general terms of the disloyalty she now alleges, though details may have come to light later. It is also clear that she knew she could sue for such conduct. Upon discharging Connor, she hired a succession of other attorneys for the avowed purpose of suing Connor, among others. She also complained to the State's Attorney.

We conclude that when Harvey discovered she had a cause of action, there remained within the regular 5-year limitations period enough time for her to file suit, *pro se* if need be. She failed to do so. Because Harvey had ample time to file her action after she discovered Connor's alleged duplicity, she is not aided by the fraudulent concealment section of the Limitations Act; her suit is untimely.

The failure to file suit within the proper time may not have been Harvey's fault personally; she assures us that she herself has worked hard pursuing her rights. She says she eventually spoke to more than 40 lawyers, looking for one who would handle her case as she wished; she has sorted through evidence many hours a week for years; and she has prosecuted her case with vigor, once she filed it. The delay, according to Harvey, was caused by attorneys who took the case and promised to sue Connor, but then did not. Some of the other lawyers Harvey consulted before the expiration of the Statute of Limitations told her she had a theoretically good case, but refused to help her. Unfortunately for Harvey, her difficulty in finding a lawyer who would properly represent her is not a proper basis for extending the limitations period. And, she is bound by the actions, or inaction, of those attorneys who did agree to represent her. If they were derelict in their performance, as she claims, this does not excuse her failure to sue in the ample time available. Her remedy, if they failed her, must now be against them, not Connor; and indeed several suits between Harvey and her later attorneys have been filed.

Judgment affirmed.

McGILLICUDDY, P.J., and McNAMARA, J., concur.

## APPENDIX B

UNITED STATES OF AMERICA

State of Illinois ) ss.
Supreme Court )

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood

Justice Howard C. Ryan

Justice Thomas J. Moran

Justice Daniel P. Ward

Justice William G. Clark

Justice Thomas E. Kluczynski

Tyrone C. Fahner, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

Be It Remembered, that, to-wit: on the 2nd day of December 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

---

Betty Sander Harvey, (a/k/a Davis),

Petitioner

No. 53832 vs.

Charles Dean Connor,

Respondent

---

Petition for Leave to Appeal from Appellate Court
First District — 78-1454

---

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 30th day of December, 1980.

Clerk.

Supreme Court of the State of Illinois.

**APPENDIX C**

APPEARANCE

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County Department Law Division

---

BETTY SANDER HARVEY

plaintiff

No. 77L10954 v.

CHARLES DEAN CONNOR

defendant

---

*Appearance and Jury Demand

The undersigned, as attorney, enters the appearance of the Plaintiff

*Plaintiff demands trial by jury.

/s/ *Betty Sander Harvey*

NAME Betty Sander Harvey (aka Davis)
ATTORNEY FOR Pro Se
ADDRESS 834 Monroe Avenue
CITY River Forest, IL 60305
TELEPHONE 369-6549
INSURANCE COMPANY

*Strike demand for trial by jury if not applicable

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

/s/ *Betty Sander Harvey*
Attorney for pro se.

## APPENDIX D

In Count I par. 2 of plaintiff's complaint she sets forth her dependence upon her legal counsel as follows:

> Plaintiff at all times herein mentioned was naive and unknowledgeable in legal matters having no legal education or training and virtually no experience in the courts, therefor she lacked even basic knowledge of proper court or legal procedure, legal terminology, proper handling of an estate or ethical conduct of an attorney. Plaintiff did not know that court records, records on deeds, conveyaces, titles, taxes, wills and others are public records, much less did plaintiff know where such records could be found. Further, plaintiff's lack of knowledge of legal terminology, the wording and phrasing of legal documents made her totally dependant on the representations of those who were legally knowledgable.

Count I par. 4 of such complaint states:

> thereafter plaintiff trusted defendant to work on her behalf, relied on and believed his representations and took his advice. Defendant, unbeknown to plaintiff, took great care to conceal his actions from plaintiff by not notifying plaintiff of court appearances unless her appearance was required by law. Then he would ask plaintiff to sign a consent and waive appearance. Further defendant did not send plaintiff copies of court orders entered in the estate. Because of defendant's concealments, plaintiff was unaware of the many deceitful actions, omissions and commissions on part of defendant which are hereinafter set forth."

These paragraphs are incorporated by way of reference in each and every count of plaintiff's complaint. In addition, each count has its own specific allegations of defendant's concealments, affirmative acts, and misrepresentations, as follows:

COUNT I—

par. 11. Defendant took great pains to conceal the facts on the trust and possibility of preserving same from plaintiff and was successful in doing so until 1976.

par. 7. Since plaintiff did not receive copy of declination filed by Harris and defendant was careful to conceal same from plaintiff, plaintiff did not know that Bank had declined and renounced only as executor.

COUNT II—

par. 10. Estate assets were misrepresented wantonly wasted, wrongfully usurped by Emma and her attorney damaging estate in excess of $500,000 a fact well known to defendant who took great care to conceal same.

COUNT III—

par. 8. Attorney for Mae Sander filed petition for fees . . . Defendant did not send plaintiff copy of petition and plaintiff was unaware of it until 1976, defendant taking great care to fraudulent conceal same.

par. 9. On Dec. 4, 1970 order entered granting such attorneys leave to withdraw as attorney for (plaintiff) sic . . . defendant did not send plaintiff copy of said order, taking great care to fraudulently conceal same.

par. 12. Plaintiff was deceived into paying all of fees . . . a fact well known to defendant who took great care to conceal same from plaintiff.

COUNT IV—

par. 7. Defendant did not send plaintiff copy of petition nor was plaintiff aware of demands in same until 1976, defendant taking great care to conceal same.

par. 12. Defendant well knew but took great care to conceal from plaintiff that Depres had petitioned only for $945.00 in fees. . . . Further defendant concealed from plaintiff the fact that in advising plaintiff to write personal check for $1,271.80 plaintiff was deceived into paying all of fees. Defendant also kept from plaintiff, knowledge that . . . an order was filed granting Despres leave to withdraw as attorney for plaintiff . . .

COUNT V—

par. 13. At no time abovementioned, was plaintiff present in court, nor did she have knowledge of such proceedings, nor copies of any orders resulting therefrom until after May 11, 1976, defendant took great care to conceal all of the above from plaintiff.

par. 16. Subsequently plaintiff learned said corporation had been wrongfully usurped and ceased to function . . . prior to said stock being distributed to plaintiff, a fact well known to defendant who took great care to conceal from plaintiff.

COUNT VI—

par. 14, Plaintiff has no knowledge as to when defendant received such stock since defendant has concealed said knowledge from plaintiff . . . plaintiff can only believe defendant willingly and intentionally withheld such stock from plaintiff.

par. 17. Defendant . . . intentionally withheld plaintiff's stock from her . . . which defendant took great care to conceal . . . resulting in loss . . .

COUNT VII—

par. 7. Defendant took no action to clarify legal residency . . . defendant well knew but took great care to conceal from plaintiff the knowledge that when publication of Notice of Probate was filed, it listed decedent's residence as Walkerton, Illinois, Walkerton being site of Sander's Indiana farm.

par. 8. Well known to defendant who took great care to conceal same was knowledge that there are very specific conditions by which to determine legal residency. Plaintiff subsequently learned all such conditions showed decedent to be Illinois resident, which conditions defendant took great care to conceal from plaintiff.

COUNT VIII—

par. 7. Defendant did not take action to obtain accurate inventory in estate.

par. 8. Unknown to plaintiff but well known to defendant who took great care to conceal facts from plaintiff, inventory misrepresented value and estate interest in Lake St. property, misstated value of Tennaco stock and others, omitted value of stamp and coin collections, wrongful death suit, decedents automobile, value of Iowa property, money in Goodbody account, stock issues and dividends from Adams Express and others, and rental income. All of the above facts were well known to defendant who took great care to conceal same from plaintiff.

COUNT IX—

par. 13. All of the abovementioned facts were well known to defendant who took great care to conceal same from plaintiff. Plaintiff at no time mentioned was present in court nor did defendant send copies to plaintiff of any of the above which bore dates of approval by the court. Further, defendant took no action to object to the abovementioned wrongs.

par. 14. Plaintiff sought copies of accounts from defendant . . .

par. 15. Defendant did not comply . . . plaintiff subsequently found errors.

par. 16. Plaintiff prevailed on defendant for remedy. Defendant asked plaintiff to approve and waive appearance.

par. 18. Defendant refused to take any action thereon but continued to conceal true facts . . . from plaintiff.

par. 19. All of the abovementioned acts were well known to defendant who took great care to fraudulently conceal same from plaintiff.

COUNT X—

par. 11. All of the above facts on rights to property in Indiana . . . method of purchase and conveyances thereto were well known to defendant who took great care to fraudulently conceal same from plaintiff.

COUNT XI—

par. 16. Defendant took great care to conceal the facts on such suit from plaintiff and did so until after May 11, 1976.

par. 19. All such representations made by defendant to falsely conceal facts and coerce plaintiff into entering Family Agreement.

All such representations were false and baseless, and made by defendant with intent that plaintiff should believe same . . . fact well known to defendant who took great care to conceal knowledge from plaintiff. Plaintiff entered such agreement signing one page at a time, which page was then removed. Plaintiff at no time saw agreement in entirety until after such was approved by the court.

COUNT XII—

par. 8. As defendant well knew and took great pains to conceal from plaintiff the aforementioned representations each and all of them were false when he made them.

par. 9. Well known to defendant who took great care to conceal same from plaintiff were the following facts. (Plaintiff then lists 21 in detail.)

COUNT XIII—

Alleges Breach of Contract.

COUNT XIV—

par. 10. (sets forth 6 breaches in the family agreement each one concluding with the statement: Reasons for this were well known to defendant but carefully concealed from plaintiff by defendant.

par. 12. Defendant by withholding from plaintiff the Federal Estate tax return, all corporate records, the accountings with approval dates and vouchers, the

facts on Arkansas law, and Indiana law, all bank records . . . concealed from plaintiff the legal substantiation of violations, therefore concealed the need to take legal action to enforce the agreement. Plaintiff urged defendant to take action to enforce holding corporate meeting and distribution to stamp and coin collections. Defendant refused and fraudulently concealed all pertinent facts.

COUNT XV—

par. 15. Defendant by withholding from plaintiff the federal estate tax return, all corporate records, accountings with approval dated, the facts on Arkansas lawsuit, facts on Indiana proceedings and law, the records on securities, all bank records on estate accounts thereby concealed from plaintiff the legal substantiation of the violation of Agreement, and therefore concealed the need to reinstate the surcharge.

COUNT XVI—

par. 13. Defendant by withholding from plaintiff Federal Tax returns, corporate records, accounting with approval dates, facts on Arkansas lawsuit, facts on Indiana proceedings and law, all securities records and all estate bank records thereby concealed from plaintiff the legal substantiation of the violation of said agreement and therefore fraudulently concealed need to set Family Agreement aside.

par. 5. Defendant was well aware of the above-mentioned facts and basis for ownership but took great care to conceal same from plaintiff, and thereby concealed his failure to perform legal services necessary to achieve clarification of title to said property.

COUNT XVII—

par. 9. Defendant took great pains to fraudulently conceal from plaintiff the following knowledge: that quit claim deeds signed by heirs of John Sander were no indication of ownership etc. (plaintiff then lists eight other facts which defendant concealed regarding the verification that the corporation owned 100% of the Lake St. property.)

COUNT XIX—

par. 7. Defendant for reasons unknown to plaintiff did not advise plaintiff honestly and truthfully, but did instead misrepresent both facts and law in many areas, including the corporation (whereupon plaintiff set forth 7 misrepresentations).

par. 8. Well known to defendant who took great pains to fraudulently conceal the facts from plaintiff, was the following knowledge (whereupon plaintiff sets forth 6 facts.)

COUNT XX—

par. 8. Defendant did not send plaintiff a copy of said petition and plaintiff was unaware of same until 1976, defendant taking great care to fraudulently conceal same. . . . Defendant did not send plaintiff a copy of said order, taking great care to fraudulently conceal same. . . . On or about Nov. 1, 1977 plaintiff learned . . . such check was not accepted . . . a fact well known to defendant who took great care to conceal same from plaintiff.

COUNT XXI—

par. 8. All of such acts and facts behind such acts were well known to defendant who took great care to conceal same from plaintiff and was successful in fraudulently doing so until after May 10, 1976.

COUNT XXII—

par. 2. Defendant deliberately participated in acts to create problems and mistrust between members of family.

par. 8. All of above acts were well known to defendant who took great care to conceal same from plaintiff . . . was successful until 1977.

COUNT XXIII—

par. 7. Defendant did not apprise plaintiff truthfully of any and all pertinent facts which would be needed for plaintiff to make logical decisions but did instead withhold such facts including but not limited to: (whereupon plaintiff sets forth 13 specific areas of concealment.)

par. 8. Defendant by withholding and secreting all of the aforementioned. . . .

COUNT XXIV—

par. 7. Defendant . . . did not take action to obtain account from Harris.

par. 8. If defendant had obtained such account plaintiff would have been aware that John Sander Inc. had been wrongfully usurped, assets depleted prior to July 1970, that Emma had taken the rents . . . would have had accurate report on securities . . .

par. 9. If such information had been known to plaintiff, plaintiff would have been aware of the wrongful acts of Emma and Makin and would have been able to take measures to preserve the balance of the estate assets and seek restitution . . . for losses incurred . . . plaintiff would have had basis for judging accuracy of inventory.

COUNT XXV—

par. 7. Defendant did not take action to determine and clarify the marital status of Emma. . . . (This count should be amended to reflect that defendant did indeed take such steps . . . determining that Emma was not an heir . . . a fact he fraudulently concealed from plaintiff until 1979. Instead he allowed Emma to have all benefits of a spouse, both under the will and renouncement.)

COUNT XXVI—

par. 11. Plaintiff believed and relied upon said representations . . . was thereby induced to and did write such check which she would not have done had she known such representations were false.

COUNT XXVII—

par. 7. Defendant did not ascertain that all documents filed on behalf of plaintiff and all agreements entered into by plaintiff were properly and correctly worded, leaving no possibility for misunderstanding, misinterpretation or misrepresentation, but did instead allow plaintiff to enter a deviously worded family agreement, sign a deviously worded agreement on payment of fees, as well as allowing any improper and inadequate documents to be filed on plaintiff's behalf.

COUNT XXVIII—

par. 27. By all of the actions set forth in paragraphs 16 and 24 defendant successfully concealed from plaintiff the knowledge that said corporation had been illegally taken over by Emma and her attorney . . . . that the Lake St. property was owned by said corporation . . . that Emma was personally allowed to collect the rent from same . . .

par. 39. Defendant by not taking action to assure the prompt and proper filing of accurate accounting successfully withheld from plaintiff the knowledge that Harris, Emma, and Makin had depleted decedent's estate, until years after the family settlement agreement.

par. 55. He fraudulently concealed from plaintiff what had happened to estate assets while such were in custody of said bank.

**APPENDIX E**

March 20, 1974

Mr. Charles D. Connor
One North LaSalle Street
Chicago, 60602

Dear Mr. Connor:

After my letter of February 16th and a follow up phone call, I was under the impression that I would be allowed to see the documents that you and Mr. Makin agreed to let me see, in his office on January 28.

However I made three unfruitful trips to the place you receive your mail, and was refused access to them. Then after several more phone calls I understood that this request would be fulfilled. I was sadly disillusioned.

The selected assortment of meangless Xerox copies of selected check stubs, Xerox copies of the month of January's pages from my father's 1949 appointment book, income tax returns made out by Mr. Makin after my father's death etc. could hardly be called records. The majority of my request was ignored. I am shocked that you did not object. What kind of charade are you playing?

Once again I respectfully request that I be allowed to see the following:

1. The corporate income tax returns of John Sander Inc. from 1949 or earlier if possible . . . to 1971 . . . and including 1971.

2. The payroll and salaries records of John Sander Inc. from 1949 through and including 1971.

3. The daily account books of John Sander Inc. from 1949 through and including 1971 and this means all twelve months complete.

4. The inventory of the sale of John Sander Inc. at the date of his death.

5. The receipts of the sale of the equipment and assets of John Sander Inc.

6. The check books and cancelled checks of John Sander from 1936 through 1971.

7. The personal income tax returns of Ernest Sander from 1936 through 1970.

8. And the personal check books and cancelled checks of Ernest Sander from 1936 through 1971.

9. All of the checks written on the Illinois and Indiana Estate and I don't mean the stubs.

10. A copy of Emma Sander's divorce decree.

I will plan to be in your office on March 26 to examine these records unless I hear from you before Monday March 25.

Sincerely,

Betty Sander Harvey
(Mrs. E. Howard Harvey)
834 Monroe
River Forest, Illinois

ALEXANDER L. STEVAS
CLERK

No. 80-1487

IN THE

# Supreme Court of the United States

BETTY SANDER HARVEY,

*Petitioner*

*vs.*

CHARLES D. CONNOR,

*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEONARD M. RING
SHELDON H. NAHMOD
*Attorneys for Respondents*

Of Counsel
LEONARD M. RING & ASSOCIATES
Suite 1333
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765

Pandick Press Midwest, Inc., Chicago • 454-7600

## QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has *certiorari* jurisdiction where a due process contention was never addressed or decided by the state courts.

2. Whether dismissal of a complaint by a state court for a plaintiff's failure to file it within the statutory limitation period for such actions, violates due process and equal protection.

3. Whether a civil litigant has a Fourteenth Amendment procedural due process claim where she asserts she was compelled to litigate *pro se* because of her inability to obtain or hold private counsel.

4. Whether a litigant in a state proceeding is denied her Seventh Amendment right because the court dismissed her suit for failure to comply with the applicable statute of limitations, although she had asked for a jury trial.

## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF AUTHORITIES | iii |
| REASONS WHY THE WRIT SHOULD BE DENIED. | 1 |
| I. | |
| The Questions Presented by Petitioner Were Never Addressed or Decided By the State Courts; Those Questions Therefore Cannot Now Be Reviewed By This Court Under Its Certiorari Jurisdiction | 1 |
| II. | |
| Petitioner's Claim of Violations of Substantive and Procedural Due Process, Equal Protection and The Seventh Amendment Are Utterly Devoid of Merit | 3 |
| CONCLUSION | 7 |

## TABLE OF AUTHORITIES

PAGE

*Cases.*

*Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 252 (1977) ..... 5
*Beaty* v. *Richardson*, 276 U. S. 599 (1928) ..... 2
*Berea College* v. *Kentucky*, 211 U. S. 45 (1908) ..... 2
*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961) ..... 4
*Cardinale* v. *Louisiana*, 394 U. S. 437 (1969) ..... 2
*Crowell* v. *Randell*, 35 U. S. (10 Pet.) 368 (1836) .. 2
*Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952) ..... 4
*Ferguson* v. *Skrupa*, 372 U. S. 726 (1963) ..... 4
*Flagg Brothers, Inc.* v. *Brooks*, 436 U. S. 149 (1978) ..... 5
*Herb* v. *Pitcairn*, 324 U. S. 117 (1944) ..... 2
*Herndon* v. *Georgia*, 295 U. S. 441 (1935) ..... 2
*Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974) ..... 5
*Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976) ..... 5
*Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U. S. 211 (1916) ..... 6
*Murdock* v. *Memphis*, 87 U. S. (20 Wall.) 590 (1874) ..... 2
*Nebbia* v. *New York*, 291 U. S. 502 (1934) ..... 4
*New Orleans* v. *Dukes*, 427 U. S. 297 (1976) ..... 5
*Ortwein* v. *Schwab*, 410 U. S. 656 (1973) ..... 4
*Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979) ..... 5
*United States* v. *Kras*, 409 U. S. 434 (1973) ..... 4
*Washington* v. *Davis*, 426 U. S. 229 (1976) ..... 5
*Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955) ..... 4

*Constitutional Provisions.*

U. S. Const. amend. VII ..... 6
U. S. Const. amend. XIV ..... 4

IN THE

# Supreme Court of the United States

---

BETTY SANDER HARVEY,

*Petitioner*

*vs.*

CHARLES D. CONNOR,

*Respondent*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

## REASONS WHY THE WRIT SHOULD BE DENIED

### I

### THE QUESTIONS PRESENTED BY PETITIONER WERE NEVER ADDRESSED OR DECIDED BY THE STATE COURTS; THOSE QUESTIONS THEREFORE CANNOT NOW BE REVIEWED BY THIS COURT UNDER ITS CERTIORARI JURISDICTION

**(1)**

Petitioner claims that the decisions of the State courts dismissing her legal malpractice complaint on Illinois statute of limitations grounds somehow violate substantive and procedu-

ral due process, equal protection and the Seventh Amendment. However, as the record demonstrates, the trial court and the Illinois Appellate Court did not address or decide these issues. In part this is because Petitioner attempted, as she now attempts, to convert what are essentially non-federal, state law issues into constitutional ones. Also, Petitioner's "shotgun" approach to this case obscures just what her constitutional claims are, despite all reasonable efforts to give her the benefit of the doubt.

In accordance with its long established and unquestioned rule, this Court has no jurisdiction to review a federal question unless it is both raised *and decided* in the state courts. *Crowell* v. *Randell,* 35 U. S. (10 Pet.) 368, 391 (1836); *Cardinale* v. *Louisiana,* 394 U. S. 437, 438 (1969). For whatever reason, the Illinois courts did not at all deal with Petitioner's constitutional contentions. As a result, Petitioner is barred from raising these contentions in this Court. *Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935); *Beaty* v. *Richardson,* 276 U. S. 599 (1928).

**(2)**

Petitioner is barred from raising her constitutional arguments in the Court for still another reason. This Court will not review a state court judgment based on an independent non-federal or state ground. *Murdock* v. *Memphis,* 87 U. S. (20 Wall.) 590, 636 (1874); *Berea College* v. *Kentucky,* 211 U. S. 45, 53 (1908); *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126 (1944). In this case, it is abundantly clear from reading the opinion of the Illinois Appellate Court that the sole ground on which the decision is based is Petitioners' failure to comply with the applicable Illinois five-year statute of limitations. Indeed, at page 8, Petitioner appears to concede this when she asserts that the Illinois courts, by dismissing her complaint, engaged in a "misapplication of the wrong statute of limitations."

For these reasons, the Petition for Writ of Certiorari must be denied.

## II

## PETITIONER'S CLAIM OF VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND THE SEVENTH AMENDMENT ARE UTTERLY DEVOID OF MERIT

Although somewhat confused, Petitioner seems to argue on the merits that the dismissal of her complaint by the Illinois courts for failure to comply with the requirements of the applicable five year statute of limitations violates substantive and procedural due process, equal protection and the Seventh Amendment. She emphasizes not only the dismissal order but her *pro se* status, as well as her alleged inability to obtain counsel to represent her. In essence, her constitutional argument for Writ of Certiorari consists of the following:

> For where complaints can be removed from adjudication of issues by a jury through the improper granting of Motion to Dismiss, achieved by misapplication of the wrong statute of limitations . . . by courts that wink at fraud, mold the law to suit their purposes and pre-empt the prerogatives of the jury . . . who indeed can be secure in his property or person. (Pet., p. 8)

### (1)

What Petitioner calls a substantive due process argument really amounts to a claim that the Illinois Appellate Court's decision affirming the dismissal of her complaint on limitations grounds has no basis in law. However, this simply means that Petitioner believes the Illinois courts erred in dismissing her complaint. Nowhere does she clearly identify the constitutional issue raised by the Illinois courts' decisions, beyond an unexplained assertion of substantive due process.

This is not surprising for there is no tenable substantive due process claim here whatever.

Clearly, the Illinois courts' decisions are not arbitrary or irrational, but are rather based on correct and reasonable interpretations of state law. *Nebbia* v. *New York*, 291 U. S. 502 (1934); *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). But even assuming *arguendo* that the Illinois courts erred on the limitations issue, in no way does this amount to a substantive due process violation. Petitioner blithely attempts to convert an issue of state law into one of substantive due process. Yet all the extensive references to fraud in her Petition relate, in fact, to the five-year Illinois limitations period—this is state law, not substantive due process. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955).

**(2)**

Petitioner's procedural due process claim is similarly frivolous. Petitioner apparently argues that her constitutional rights were violated because she was "forced" to sue *pro se*! In this regard she points out that numerous lawyers allegedly refused to assist her in pursuing this legal malpractice claim. But this Court has never even come close to holding that a civil plaintiff has a due process right to counsel. Indeed, to the contrary, this Court has held that even indigent plaintiffs unable to pay court costs do not have an unqualified right of access to the courts in civil cases. *United States* v. *Kras*, 409 U. S. 434 (1973); *Ortwein* v. *Schwab*, 410 U. S. 656 (1973).

Furthermore, the alleged refusal of *private* attorneys to represent Petitioner in this case cannot constitute a Fourteenth Amendment procedural due process violation. Procedural due process applies only to *state action*, and in no sense can the alleged conduct of the private attorneys here constitute state action for Fourteenth Amendment purposes. There is no symbiotic relationship, *Burton* v. *Wilmington Parking Authority*,

365 U. S. 715 (1961); no governmental involvement or encouragement, *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974); and no exclusive governmental function, *Flagg Bros. Inc.* v. *Brooks*, 436 U. S. 149 (1978).

Moreover, it is questionable whether Petitioner in fact had no choice but to proceed *pro se*. On page 4, Petitioner contends she "resorted to acting *pro se* after six lawyers she had retained perpetuated Connor's concealments and aligned themselves with her adversaries." As she develops her argument, however, it becomes quite apparent that she in fact quarreled with her lawyers over legal issues and strategy. This is a far cry from being *forced* to appear *pro se*.

(3)

Little need be said about Petitioner's equal protection argument. For one thing, it appears to be based on Illinois law, not the Fourteenth Amendment. (See page 24 of Petition of Writ of Certiorari.) For another, there is no contention made, as required, that the state somehow *purposefully* discriminated against her. *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 252 (1977); *Personnel Administrator* v. *Feeney*, 442 U. S. 256 (1979). Petitioner was not treated differently from other legal malpractice plaintiffs. She simply did not satisfy the applicable Illinois five-year limitations requirement. Clearly, the Illinois courts had a rational basis for such treatment premised on the application of the relevant statute of limitations to Petitioner's complaint. *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976).

**(4)**

Finally, Petitioner's claim of a Seventh Amendment violation stemming from the dismissal of her complaint is equally meritless. First, the Seventh Amendment does not directly apply to the states. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis,* 241 U. S. 211 (1916). Second, even if it did, Petitioner's argument amounts to making the following rather remarkable assertion: *where a plaintiff asks for a jury trial, the Seventh Amendment prevents a court from dismissing a complaint for failure to comply with an applicable statute of limitations.* Petitioner utterly ignores the fact that a jury has no Seventh Amendment function to perform where a complaint is dismissed on a limitations ground because the complaint's allegations are taken as true for this purpose.

The foregoing discussion of substantive and procedural due process, equal protection and Seventh Amendment issues demonstrates convincingly that Petitioner is challenging the Illinois Appellate Court's decision in this case on state law grounds alone. Her constitutional arguments are but transparent attempts to convert her state law grounds into federal constitutional claims in order to argue to this Court that it should exercise its certiorari jurisdiction. However, there is no legal basis whatever for so doing.

For these additional reasons, the Petition for Writ of Certiorari should be dismissed.

## CONCLUSION

The Petition for Writ of Certiorari is totally devoid of merit.

In the first place, the Illinois courts did not address Petitioner's constitutional arguments. She therefore cannot raise them in this Court.

Secondly, the state court judgment is based exclusively on an independent, non-federal state ground.

Petitioner's substantive due process arguments are equally unmeritorious. She does not clearly identify any constitutional issue, but simply asserts that she was denied substantive due process. This obviously is not enough.

All in all, this case merely involves the application by the Illinois courts of an Illinois limitations statute. It involves no federal question whatever.

The Petition for Writ of Certiorari must be denied.

LEONARD M. RING
SHELDON H. NAHMOD
*Attorneys for Respondents*

Of Counsel
LEONARD M. RING & ASSOCIATES
Suite 1333
111 West Washington Street
Chicago, Illinois 60602
(312) 332-1765